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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JACKIE COLLINS LERMAN,

Petitioner,

v.

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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28 pp

Questions Presented

1. If a sexually explicit magazine publishes and uses for promotional purposes petitioner's name on its cover, and includes inside the magazine nude photographs that are falsely stated to be of her, do the First and Fourteenth Amendments forbid a state to subject the publisher and distributor to liability for a non-consensual invasion of her rights, unless the attribution has been proved to be malicious in the sense of *New York Times Co. v. Sullivan, Time, Inc. v. Hill* and *Gertz v. Robert Welch, Inc.*?

2. Do the facts that a successful female author of erotic novels who wrote the screenplay for a film involving nudity and has publicly favored sexual equality for women make her a "limited purpose public figure" who must prove "actual malice" in order to recover for invasion of her privacy by the false assertions that (a) she performed in that film in the nude and (b) still photographs of her in the nude from that film were republished in the magazine?

3. Is a distributor who receives actual notice of the unlawful use of a person's name, and is expressly warned against advertising the offensive issue of a magazine, insulated from liability by the actual malice standard as a matter of law because it does not review issues of the magazine and thus does not actually know that prohibited advertising appeared in subsequent issues?

4. Did the Court of Appeals violate the requirements of fair procedure by ordering the dismissal of the action rather than remanding for a new trial?

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FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Jackie Collins Lerman prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on September 10, 1984.

Opinions Below

The opinions of the Court of Appeals, 745 F.2d 123, and of the District Court, 544 F. Supp. 966, 521 F. Supp. 228, 496 F. Supp. 1105, appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 10, 1984. A timely petition for rehearing *in banc* was denied on October 25, 1984, and this Court on January 18, 1985 extended petitioner's time within which to petition for certiorari until February 23, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

The First and Fifth Amendments to the Constitution of the United States, and §§50 and 51 of the New York Civil Rights Law are set out in their entirety in the Appendix.

Statement of the Case

A sexually explicit men's magazine, *Adelina*, contained a regular section called "Archives" which each month featured nude photographs of female celebrities. The May 1980 issue of *Adelina* announced on its cover that Jackie Collins (along with Charlotte Rampling, Karen Black, Anna Moffo and others) appeared "in the nude" in the "Archives" section of the magazine (87a). At page 119 of the May 1980 issue, Jackie Collins was described in bold print as the "starlet" depicted in a single nude photograph and in a photograph of an orgy scene of two men and three women; the photographs were stills from the movie "The World Is Full Of Married Men" (88a). Petitioner is neither an actress nor a "starlet," but is a successful novelist who wrote the screenplay for that film, but never appeared nude in that or any other film, and the photographs are not of her.

Petitioner learned of this publication upon receiving at her residence in London, England, an advance copy of the May 1980 issue of *Adelina* from her former publicist, who believed the photographs were actually of her. On March 24, 1980, petitioner commenced an action for libel, statutory invasion of privacy under §§50 and 51 of the New York Civil Rights Law, and violation of her right of publicity against the publisher of *Adelina*, Chuckleberry Publishing, Inc. ("Chuckleberry"), and the national distributor listed in the magazine, Publishers Distributing Company, Inc. ("PDC"). The lawsuit was filed in the United States District Court for the Southern District of New York, and jurisdiction was based on diversity of citizenship under 28 U.S.C. §1332(a)(2).

A preliminary injunction was entered on March 31, 1980, and on July 31, 1980, the District Court granted partial summary judgment on petitioner's privacy claim. *Lerman v. Chuckleberry Publishing, Inc.*, 496 F. Supp. 1105 (S.D.N.Y. 1980). Subsequently, the cover of the May 1980 issue of *Adelina*, using petitioner's name under the bold caption "in the nude," was reprinted as part of a tearout subscription advertisement for the magazine. The subscription advertisement appeared in both the June 1980 and January 1981 issues of *Adelina*, and petitioner was granted leave to serve a supplemental complaint to assert similar claims based upon these additional publications. At the same time, the District Court denied the defendants' motions for summary judgment on the libel claim, holding petitioner to be a private person rather than a public figure. *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228 (S.D.N.Y. 1981). PDC had conceded that petitioner was not a general purpose public figure, but argued that she was a limited purpose public figure. The District Court rejected that argument on the ground that:

> It is difficult to conclude that the issue of sexual liberation of actresses in American film is more than a matter of general public interest that may be newsworthy. In my opinion, it simply cannot be said that there is a real dispute with respect to this matter, the outcome of which affects the general public or some segment in an appreciable way . . .
>
> Furthermore, Lerman "at no time assumed any role of public prominence in the broad question of concern," *id.* at 135, 99 S.Ct. at 2688, if one can be said to exist, about the sexuality of actresses in American film. Lerman did not write about the sexual liberation of actresses on the screen and certainly did not inject her views into a controversy on this topic. Lerman herself never

> modeled and although she had a brief acting career, it does not appear that she ever appeared nude on the stage or the screen. Finally, although Lerman was photographed on several occasions for publicity purposes, she was never photographed in the nude.
>
> Defendant's contention that plaintiff is a public figure for the limited purpose of promoting, publicizing and selling sex must be rejected. First, as discussed above, such a general characterization of the public controversy does not isolate with the required particularity, the controversy which gave rise to the defamation in this case. Second, the consequence of adopting defendants' analysis would be to expose any prominent author of novels about human sexuality who engages in conventional promotional activities to publicize them to the risk that intimate details of his personal life may be disclosed falsely by a news media clothed with the protections of *Times v. Sullivan* and its progeny. This result would be improper where the author has not injected his personal conduct or his own nudity into the public discussion. Furthermore, such an approach would undermine the legitimate interests of the states in protecting their citizenry from "the harm inflicted . . . by defamatory falsehood" *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341, 94 S.Ct. at 3008. *Id.* at 234-35.

At the same time, the District Court granted petitioner's motion for summary judgment as to liability against PDC on the right of publicity claim, finding all of the elements of that tort established by the factors that created statutory liability for invasion of privacy.

During the course of discovery, petitioner learned that the national distributor for the June 1980 and January

1981 issues of *Adelina* had not been PDC, but was Flynt Distributing Company, Inc. ("Flynt"), which had purchased the assets and assumed the liabilities of PDC pursuant to a written agreement dated February 29, 1980. On April 15, 1981, petitioner sued Flynt for identical causes of action arising from Flynt's distribution of the June 1980 and January 1981 issues of *Adelina*.

After Flynt answered interrogatories, petitioner learned for the first time that Flynt was legally responsible for the May 1980 issue of *Adelina* as well, since it expressly assumed all of PDC's liabilities for *Adelina* as of February 29, 1980, almost a month before the on-sale date of the May 1980 issue. Accordingly, petitioner moved to amend her complaint against Flynt to include the May 1980 issue, and to consolidate the lawsuit against Flynt with the pre-existing lawsuit against Chuckleberry and PDC. On June 3, 1982, both motions were granted. Petitioner was also granted partial summary judgment as to liability against Flynt on her privacy and publicity claims, and Flynt's motion for summary judgment on the ground that the advertisements using her name were protected as isolated and incidental uses was denied. *Lerman v. Chuckleberry Publishing, Inc.*, 544 F. Supp. 966 (S.D.N.Y. 1982).

The action against Chuckleberry was stayed because of bankruptcy proceedings, and petitioner settled with PDC in February 1983. In June 1983, the District Court dismissed petitioner's libel claim as defective on the ground that the false statements about her appearing nude constituted at most libel *per quod* and that petitioner had not pleaded or sought any special damages. The District Court further held that any violation of her right of publicity was subsumed within her statutory right of privacy. The case proceeded to trial on June 13, 1983.

The District Court charged the jury in order to hold Flynt liable for the May 1980 issue "plaintiff must prove by a preponderance of the evidence that Flynt Distributing

was the distributor of the May 1980 issue of *Adelina.*" The District Court also charged that petitioner had the burden of proving her case for damages "by a fair preponderance of the evidence." The court advised the jury, however, that it had found Flynt liable for distribution of the June 1980 and January 1981 issues of *Adelina,* and that its responsibility was to assess compensatory damages for those claims. In addition, the District Court charged as follows:

> In order for plaintiff to recover punitive damages against FDC for violation of section 51 of the New York Civil Rights Law, plaintiff is required to prove that FDC knowingly used plaintiff's name without her consent in distributing the June 1980 and January 1981 issues of Adelina. If you find that FDC in distributing the June 1980 and January 1981 issues, acted in reckless disregard of whether plaintiff had consented to the use of her name, you may also award punitive damages. The burden of proving knowing or reckless use is on the plaintiff. By reckless disregard is meant not just negligent use, but use in conscious disregard of whether consent had been granted. Absent a showing of such knowing or reckless use, plaintiff is not entitled to recover punitive damages.

On June 17, 1983, using a special verdict form, the jury returned a $40,000,000 verdict in petitioner's favor, awarding her $7,000,000 in compensatory and $33,000,000 in exemplary damages, consisting of $800,000 compensatory damages arising from the May 1980 issue, $1,200,000 compensatory and $1,000,000 punitive damages arising from the June 1980 issue, and $5,000,000 compensatory and $32,000,000 punitive damages arising from the June 1981 issue of *Adelina.* The District Court granted a remittitur, reducing the exemplary damages award by $30,000,000, leaving intact $7,000,000 compensatory and

$3,000,000 exemplary damages. It was from this $10,000,000 judgment that Flynt appealed.

On September 10, 1984, the Court of Appeals reversed the judgment and dismissed petitioner's complaint. *Lerman v. Flynt Distributing Co.*, 745 F.2d 128 (2d Cir. 1984). It disagreed with the District Court that the use of plaintiff's name and purported nude picture without her consent sufficed to create liability under the New York privacy statute as a use "for purposes of trade," and that knowing use without consent sufficed, as the statute provides, for exemplary damages. Granting that "plaintiff's name in all three *Adelina* issues are [sic] fictionalized or false and therefore lose the privilege that ordinarily extends to reporting matters in which the public has an interest" and, further, that "the degree of falsity here was severe since plaintiff was not the actress pictured," the Court acknowledged that "[w]ere it not for Constitutional concerns this falsity would permit a properly instructed jury to find the uses here to be for trade purposes under §51 of the New York Civil Rights Law," *i.e.*, that the judicially constructed privilege for a newsworthy use would not arise. 745 F.2d at 133. It proceeded to hold, however, that "precisely because of First Amendment guarantees, Flynt Distributing cannot be held liable for the use of plaintiff's name unless it acted with the requisite fault . . . ". *Id.* The "requisite fault," in the Court's view, was that required by this Court's decision in *Gertz v. Robert Welch, Inc.*, to impose liability for defamation of a "limited purpose public figure" (which plaintiff was held to be for purpose of this publication), namely, "clear and convincing evidence that some high level employee" of Flynt "acted with reckless disregard of the fact that false matter had been published . . . " *Id.* at 140.

Since the District Court had not instructed the jury that it must find Flynt to have acted with "actual malice" in the foregoing sense, the judgment was reversed. Moreover,

assessing the evidence adduced by the petitioner, the Court of Appeals considered that a "properly instructed jury could not fairly and rationally conclude upon clear and convincing evidence that this defendant's uses were knowing or made with actual malice," *id.* at 141, "evidence of 'knowing use'" being regarded as "identical to the evidence of actual malice," *id.* at 140. Concluding that "Ms. Lerman cannot present clear and convincing evidence of defendant's requisite fault with respect to the factual error disseminated," *id.* at 142, the Court of Appeals not only reversed the judgment but also dismissed the complaint. Judge Bonsal, sitting by designation, dissented from the judgment of dismissal, expressing the view that the case should be remanded to the trial court to accord plaintiff "an opportunity for further discovery and a trial on the issue of actual malice—whether defendant acted with knowledge of falsity or in reckless disregard of the truth." *Id.*

Reasons for Granting the Writ

I.

In holding that the First and Fourteenth Amendments forbid a state from imposing civil liability for use of petitioner's name and purported nude pictures without her consent in the absence of "actual malice" with respect to the erroneous attribution, the Court of Appeals ignored the teaching of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). At the least, the Court of Appeals has decided an important issue of constitutional law which has not been, but should be, settled by this Court.

Once the Court of Appeals categorized plaintiff's lawsuit as a "classic false light claim," 745 F.2d at 134, it felt constrained to apply the constitutional limitation of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), a false light case which did not involve a claim of commercial appropriation. In this case, the petitioner was complaining about the wrongful *use* of her name as much as the falsity of the portrayal; merely because the use involved an element of falsity does not justify the application of a greater constitutional

degree of fault than would otherwise be appropriate for a commercial appropriation case. The Court of Appeals should have followed the teaching of *Zacchini*, decided ten years after *Hill*, which on its facts and underlying policy is far more analogous to this case.

In holding that petitioner must prove that Flynt acted with "the requisite fault," the Court of Appeals blindly applied the "actual malice" test, rather than ascertaining whether a lower standard, such as a "knowing use," would be sufficient to satisfy the constitutional requirement of fault. In the circumstances of this case, the statutory requirement of "knowing use" afforded Flynt ample constitutional protection, and petitioner should not have been subjected to the more stringent requirement of proving "actual malice."

Just as this Court has made clear that "[m]isleading advertising may be prohibited entirely," *Re R.M.J.*, 455 U.S. 191, 203 (1982), so too may "knowing use" of a person's name for purposes of trade be made the subject of liability.* Even Mr. Justice Powell, who dissented in *Zacchini* on the ground that there was First Amendment protection for the television broadcast, would have denied that protection if that form of commercial appropriation had been "a subterfuge or cover for private or commercial exploitation" rather than news. 433 U.S. at 581.

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* In *R.M.J.*, this Court recognized that "truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *Id.* This Court cited in footnote 15, *Central Hudson Gas & Electric Corp. v. Public Service Corporation*, 447 U.S. at 566, for the proposition that for commercial speech to come within the First Amendment "it at least must concern lawful activity and not be misleading."

The use of petitioner's name on the cover of a pornographic magazine for the sole purpose of drawing attention to the magazine and attracting purchasers is a commercial rather than a newsworthy purpose, and cannot be excused by the "subterfuge" of the vapid text that appears within the magazine accompanying nude photographs purporting to be of the petitioner. The evidence clearly established commercial appropriation, and it was error to apply the elevated constitutional protection of the "actual malice" standard merely because the commercial appropriation included an element of falsity.

The question raised by this case is whether the protection framed in *Time, Inc. v. Hill,* is required as a matter of constitutional law, or whether this is a matter which should be left to the states for regulation on the basis of some lesser degree of fault defined by state law—such as "knowing use" under §51 of New York's privacy statute. As this Court recognized in *Zacchini,* there are multiple state interests which underlie the various aspects of the privacy tort. 433 U.S. at 573. Earlier Mr. Justice White writing for the majority in *Cox Broadcasting Co. v. Cohn,* 420 U.S. 467 (1975), noted that in reviewing the leeway of the states to protect privacy interests "it is appropriate to focus on the narrower interface between press and privacy," *id.* at 481, and Mr. Justice Powell in his concurring opinion stated that "the Constitution may present a different balance to be struck" depending upon the interests intended to be protected, *id.* at 500.

In *Time, Inc. v. Hill,* this Court was only addressing one of these interests. As explained in *Zacchini,* 433 U.S. at 571-72:

> *Time, Inc. v. Hill,* which was hotly contested and decided by a divided Court, involved an entirely different tort from the "right of publicity" recognized by the Ohio Supreme Court. As the opinion reveals in *Time, Inc. v. Hill,* the Court

> was steeped in the literature of privacy law and was aware of developing distinctions and nuances in this branch of law. The Court, for example, cited W. Prosser, Law of Torts 831-832 (3d ed. 1964), and the same author's well-known article, Privacy, 48 Calif. L. Rev. 383 (1960), both of which divided privacy into four distinct branches. The Court was aware that it was adjudicating a "false light" privacy case involving a matter of public interest, not a case involving "intrusion," 385 U.S. at 384-385, n.9, 17 L.Ed.2d 456, 87 S.Ct. 534, "appropriation" of a name or likeness for the purposes of trade, *id.*, at 381 17 L.Ed. 456, 87 S.Ct. 534, or "private details" about a non-newsworthy person or event, *id.*, at 383 n.7, 17 L.Ed.2d 456, 87 S.Ct. 534.

Moreover, this Court in *Time, Inc. v. Hill* stressed that its holding was limited to its peculiar facts, which involved fictionalization of the ordeal of a family held hostage for nineteen hours by a group of escaped convicts. In that case, a core of facts was embellished and fictionalized upon to present the family in a false light. In this case, the publication of petitioner's name was not predicated upon a core of truthfulness, but upon a total falsification for sensational purposes. Thus, the use of petitioner's name on the cover of *Adelina,* with those of several other celebrities, was for the commercial and exploitative purpose of attracting purchasers. There was no embellishment or fictionalization of true events or occurrences which are within the sphere of legitimate public interest and concern. Instead, the unauthorized exploitation of petitioner's name represents the kind of commercial appropriation actionable under available state remedies.

There is a considerable difference between the false statement in *Time, Inc. v. Hill* that the play was a reenactment of a family's ordeal and the false claim in this

case that petitioner appears nude in *Adelina*. In the former situation, there is a genuine First Amendment need for the press to have the breathing space necessary to fully review and describe a play that was inspired by a real life experience; in the latter situation, the use of petitioner's name was not in the context of reviewing a play, reporting news or disseminating information, but rather solely for the shock value of allegedly exposing nude photographs of a celebrity. The constitutional protections deserved by these uses are different and should not be treated in the same way; the accommodation between the First Amendment and individual privacy interests should be reached in this case by allowing the states to define the standard of liability, as this Court permitted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), so long as it is not liability without fault. *Id.* at 397.

The commercial exploitation here is far closer to *Zacchini* than to *Hill*. In *Zacchini*, the Ohio Supreme Court ruled, as did the Court of Appeals in this case, that the privilege of *Hill* extended to cover a new branch of the privacy tort—newscasts that impinge upon an individual's right to publicity. This Court reversed that holding, deciding that although a state may grant the press such a privilege, the First Amendment does not require it to do so.

Several important factors were noted by this Court in *Zacchini*. First, the television station *knew* that the plaintiff objected to its use of his act. Second, *Rosenbloom*, *Gertz* and *Firestone*, the relevant libel precedents decided subsequent to *Hill*, all involved the reporting of news events. Third, it was aware of the variety and diversity of conduct encompassed by the privacy tort. The Court quoted with approval from Prosser and from a Third Circuit Court decision, *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956), which commented that the rights of privacy and publicity were two "polar types of cases" and [b]etween

the two extremes are many gradations, most involving strictly commercial appropriation of some aspect of an individual's personality, such as his name or picture." 433 U.S. at 572 n.9.

In *Zacchini*, this Court did not view *Time v. Hill* applying across the board to the entire field of privacy, and specifically indicated that the commercial appropriation present there was not to be accorded constitutional protection. This case cries out for definition and guidance from this Court so that lower courts do not continue to apply the doctrine of *Time, Inc. v. Hill* in such an expansive manner as to undermine the individual's right to be free from commercial exploitation.

II.

Assuming that liability for invasion of privacy is subject to the constitutional standard defined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requiring public figure analysis, the decision of the Court of Appeals that petitioner is a "limited purpose public figure" for purposes of any publication relating to nudity clearly conflicts with the recent decisions of this Court in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979).

The Court of Appeals assumed, properly in our view, that the "actual malice" requirement articulated in *Time, Inc. v. Hill* has been modified *sub silentio* by this Court in its decision in *Gertz*, which rejected the public interest test of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).* However, although the Court of Appeals professed to apply the

* As Mr. Justice Powell expressly recognized in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 498 n.2 (1975); "*Gertz* calls into question the conceptual basis of *Time, Inc. v. Hill*"; Restatement of Torts, Second §652E, comment d. See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 250-51 (1974).

public figure test of *Gertz* for determining whether petitioner was a "limited purpose public figure," it actually reverted to the "public interest" test *Hill* had adopted for privacy cases and *Gertz* had later discredited.

The cases decided since *Gertz* make it clear that a person should not be considered a "public figure" solely because that person attracts public attention, for example, as a criminal defendant, *Wolston v. Reader's Digest Ass'n, supra*, a socialite seeking a divorce, *Time, Inc. v. Firestone, supra*, or a recipient of a government grant, *Hutchinson v. Proxmire, supra*. The lesson of these cases is that the mere involvement of a person in a matter which the media or the public deems to be of interest does not, in and of itself, require that such person be classified as a public figure for even the limited purpose of a libel action, and courts must look for evidence of affirmative acts by which that person has thrust himself into the forefront of a particular public controversy.

In finding petitioner to be a limited purpose public figure in the controversy that purportedly "swirl[s] about . . . contemporary standards regarding nudity," the Court of Appeals defined a public controversy as "any topic upon which sizeable segments of society have different, strongly held views." 745 F.2d at 138. This definition of "controversy" departs from the particularized controversy requirement of this Court's most recent libel decisions, and misapplies the public figure definition to reinstate the discarded "public interest" test of *Rosenbloom*.

Moreover, the concern expressed by the Court of Appeals about the "deep-freeze" effect on the media of privacy suits like petitioner's would better be addressed to authors who, under the rationale of the Court of Appeals, can now become falsely portrayed by a privileged press as any fictional character about whom they write. The creative process itself will be chilled if authors can be falsely identified with the characters they invent and be deemed

public figures when they seek redress for invasion of their privacy.

The petitioner here did not voluntarily inject herself into the vortex of a *particular* controversy raging over whether starlets should appear nude. To say she forfeited her personal right of privacy because of her general feminist opinions on the subject is tantamount to abolishing the right of privacy for anyone who is capable of expressing opinions. That she has voluntarily chosen to deal with the subject publicly at press conferences and in her novels, does not mean she abandoned her right not to be portrayed in the nude without her consent.

In *Wolston v. Reader's Digest Ass'n, supra,* 443 U.S. at 167, this Court explained that: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention . . . " In *Time, Inc. v. Firestone, supra,* 424 U.S. at 453-54, this Court warned against equating "public controversy" with "all controversies of interest to the public" and held that a *particular* public controversy was not created by the "cause celebre" of Mrs. Firestone's divorce.

Similarly, in *Hutchinson v. Proxmire, supra,*443 U.S. at 134-35, this Court held that "concern about general public expenditures" did not identify a "particular controversy." If it did, "everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected." *Id.* at 135. The subject of "contemporary standards regarding nudity," 745 F.2d at 138, is no more particular a controversy than "concern about general public expenditures." To hold otherwise employs general "subject-matter classification" which "too often result in an improper balance between the competing interests in this area." *Time, Inc. v. Firestone, supra,* 424 U.S. at 456.

The Court of Appeals essentially deemed petitioner a limited purpose public figure because her erotic novels have attracted public attention and she has made promotional appearances in connection with her literary works. On this basis alone she was required to prove liability by clear and convincing evidence of "actual malice." These limited activities should have classified her as a private figure, giving her the opportunity to prove Flynt's liability on the basis of a less stringent standard and a different quantum of proof.

III.

Even if the "actual malice" standard applied as a matter of constitutional law, the Court of Appeals was wrong in holding on this record there was insufficient evidence to present that issue to the jury, and in any event erred in dismissing the case rather than remanding it for a new trial.

In view of the advance notice and warning given to Flynt of the unauthorized use of petitioner's name, the ruling that no malice exists as a matter of law effectively eliminates the "reckless disregard" branch of the "actual malice" test and makes it impossible for a plaintiff ever to satisfy that stringent burden of proof.

This Court has defined "actual malice" alternatively as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Thus it is not necessary to show an actual subjective awareness of falsity, so long as there exist serious doubts as to the truth.

By holding that the evidence in this case fails to create even a triable issue of "actual malice," the Court of Appeals focused solely upon "subjective awareness" of falsity, totally ignoring the reckless disregard branch of that test. Moreover, its analysis places a premium upon

ignorance and allows a culpable party to avoid liability "by the simple expedient of closing one's eyes, covering one's ears and holding one's breath." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 500, 410 N.Y.S.2d 282, 286 (1978).

It is well recognized that to discharge the difficult burden of proving "actual malice," circumstantial evidence must be relied upon. *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979). In this case, the approach of the Court of Appeals foreclosed the possibility of inference from circumstantial proof, and elevated the burden to a virtually unattainable level.

The Court of Appeals in effect held that "the trial judge should have granted summary judgment to the defendant based on the lack of evidence of actual malice." 745 F.2d at 140. This result destroys the impact of the clear proof of notice and express warning to Flynt, which evidence is especially significant since "proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire, supra*, 443 U.S. at 120 n.9.

In a brief passage from its lengthy opinion, the Court of Appeals purported to undertake a "careful examination of the voluminous record," 745 F.2d at 140, but totally ignored the key proof that created an issue of fact. Reciting that Flynt's knowledge of petitioner's lawsuit and its failure to investigate, standing alone, are insufficient to constitute "actual malice," the Court of Appeals inexplicably failed even to mention the letter dated April 11, 1980 to Flynt from PDC, the former distributor of *Adelina* (89a), whose assets had been purchased by Flynt prior to distribution of the offending magazines.

Besides explaining to Flynt in detail the basis for petitioner's lawsuit and her successful application for a preliminary injunction, the letter demanded that Flynt "should properly shoulder the responsibility with regard

to said Magazine and the above action" (89a), and specifically warned Flynt that it was enjoined from advertising the May 1980 issue of *Adelina*— yet that is precisely what Flynt proceeded to do when it distributed the June 1980 and January 1981 issues. Flynt thus had actual notice of petitioner's contentions concerning the unauthorized use of her name, the commencement of her lawsuit, the granting of a preliminary injunction directing the recall of the magazines and the entry of partial summary judgment in petitioner's favor determining that her statutory right to privacy had been violated. This proof certainly created a jury issue as to Flynt's reckless disregard for these warnings which, coupled with absolutely no information supporting the truth of the publication, shows actual malice on the part of Flynt.*

This Court has already rejected the proposition that "[p]rofessions of good faith" standing alone are sufficient to overcome a claim of malice, and has recognized that a duty of further inquiry may arise under some circumstances. *St. Amant v. Thompson*, 390 U.S. 727, 732-33 (1968). Thus, a defendant cannot "feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982), and cases cited therein; *Hunt v. Liberty Lobby*, 720 F.2d 631, 644 (11th Cir. 1983).**

* New York's highest court has approved punitive damage awards on the basis of prior notice or warning. *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 146, 151 (1982); *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978).

** Although the Court of Appeals paid lip service to the "reckless disregard" prong of the "actual malice" test, it nevertheless insisted that reckless disregard had to relate to the "fact that false matter had been published," 745 F.2d at 140, rather than to the repeated, unauthorized use of petitioner's name,

(footnote continued on the following page)

Moreover, the Court of Appeals' outright dismissal of petitioner's complaint, rather than remanding for a new trial, contravenes accepted notions of fairness as well as procedural due process and the right to a jury trial guaranteed by the Fifth and Seventh Amendments. This Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), restated "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The Court of Appeals' misreading of *Bose Corp. v. Consumers Union*, 52 U.S.L.W. 4513 (1984), led it to exceed its proper authority as an appellate tribunal. In *Bose*, this Court held that an appellate court may make an independent examination of the entire record to ensure that a finding of "actual malice" is based on clear and convincing evidence. *Bose* announced a standard of appellate *review;* it did not authorize an appellate court to make an *original* finding of fact on an issue not addressed below. Implicitly acknowledging the absence of any finding of "actual malice" in this case, the Court of Appeals enabled itself to apply the *Bose* doctrine only by erroneously equating "actual malice" with "knowing use" under §51 of the New York Civil Rights Law.

"Actual malice" concerns a defendant's knowledge of some alleged falsity; "knowing use" concerns a defendant's

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(footnote continued from the preceding page)
which was the gravamen of her complaint. As indicated in Point I above, since commercial appropriation primarily addresses a wrongful taking of property rights, the Court of Appeals' labelling of petitioner's claim as a "false light" case caused it to unduly emphasize the falsity aspect of her complaint rather than the misuse of her name. To then conclude that no jury could "rationally" find "actual malice" on this record, *id.* at 141, was to misapply the reckless disregard branch of the "actual malice" test in this case of commercial appropriation.

knowledge of an unauthorized use of a person's name or likeness to which falsity may be irrelevant. New York law recognizes the difference between the two standards. *Welch v. Mr. Christmas, Inc.*, 57 N.Y.2d 143 (1982). Proof of one has little or nothing to do with proof of the other. Based on the District Court's summary judgment decisions declaring the "actual malice" test inapplicable to this case, petitioner sought at trial to prove "knowing use" and understandably did not pursue discovery and proof of "actual malice." It is this record of "knowing use" that the Court of Appeals mistakenly reviewed for clear and convincing evidence of "actual malice," and found the evidence lacking because of its erroneous premise that "actual malice" is the same as "knowing use."

The proper procedure should have been to remand for a new trial, as was done in *Time, Inc. v. Hill, supra*, 385 U.S. at 394 n.1. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), this Court found that, while a jury verdict required reversal due to the trial court's failure to apply the "actual malice" standard, the case would be remanded for retrial, and *not* dismissed. In this case, having found that the District Court erred in failing to apply the "actual malice" test, the Court of Appeals should not have foreclosed petitioner from presenting her case under appropriate jury instructions. As Judge Bonsal said in partial dissent, the fact that petitioner may have a heavy burden to show "actual malice" is not a "sufficent reason to deny her the opportunity to do so." 745 F.2d at 142.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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